In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 2

NEW WORLD LIFE INSURANCE COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES SUPPLEMENTAL TO MOTION TO DISMISS

1. The taxpayer has filed a brief in opposition to our motion to dismiss in which it concedes (p. 2) that the reserve question was raised in this case by the Government solely as a defensive issue, and that no judgment was entered in the Government's favor on account of that issue. The taxpayer does not challenge the Government's assertion that the judgment below would remain unaffected regardless of how this Court might decide the reserve issue. Petitioner simply states that the same issue is presented in a case involving other tax years pending in the Court of Claims and that it would

264742—40

be spared the burden of litigating that case if this Court were to decide the issue here. And it states further that the determination of the issue is important to other life-insurance companies (pp. 2–3). However, it is clear that the Court will not render advisory opinions regardless of the importance of the question or of convenience to the parties.

2. In apparent recognition of the moot character of the issue, petitioner has attempted by an unusual maneuver to impart vitality to this case. Recognizing that the reserve issue was raised only defensively by the Government and that it could not have been raised otherwise since the statute of limitations had run against the Government, petitioner now, for the first time, attempts to waive the statute of limitations and consents to the entry of judgment in favor of the United States to the extent of Fifty Dollars. The short answer to petitioner's position is that the Government did not seek below nor does it seek in this Court any affirmative judgment against petitioner on account of the reserve issue. We respectfully decline to take advantage of petitioner's limited generosity. Indeed, in view of the fact that the United States itself has not petitioned for certiorari in this case, an affirmative judgment probably could not be entered in its favor on this issue. Cf. *Le Tulle* v. *Scofield*, 308 U. S. 415. 421–422.

3. Petitioner finally requests the Court to reverse the judgment below, rather than to dismiss the writ,

if our motion is granted. We respectfully submit that such procedure would be wholly unwarranted. Petitioner in the court below sought refund with respect to investment expense deductions, and the Government raised the reserve issue solely as a defensive issue. The court below denied recovery on the investment expense issue and entered judgment accordingly. That judgment is correct and should not be reversed.

The decisions cited by petitioner (pp. 4–5) deal in general with cases where the entire controversy has become moot subsequent to the decision below, and in disposing of the matter this Court quite naturally ordered a reversal of the judgment below since it would not have been responsive to existing facts had it been permitted to stand. Here, on the other hand, the judgment of the Court of Claims is entirely correct: it dismisses the taxpayer's petition because no refund is due to the taxpayer. That judgment is responsive to the facts as well as the pleadings and should not be reversed. The proper procedure here is to dismiss the writ.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940